FILED
SEP 1 1945
CHARLES ELMORE CROPLEY
CLERK

NEW-NOR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

(1)

No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

T. J. WILLS,
Counsel for Petitioner.

152212

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Question involved	1
Jurisdiction	2
History of the case	2
Court misinterprets Section 407, Title 40, U.S.C.A.	10
The proper construction of the Miller Act, Title 40 U. S. C. A., Section 270(a) and 270(b)	11
Who may file a petition in involuntary bankruptcy.	12
The Court's construction of Title 11, U. S. C. A., section 21 was erroneous	13
Jury trials	13
Prayer for writ	15
Brief in support of petition	17
40 U. S. C. A. 407	17
The petitioning creditors were secured by bond—"The Miller Act"	19
Who may file a petition in involuntary bankruptcy.	20
Amendments were improperly allowed	20
Jury verdict set aside	21

Table of Cases Cited

American Bonding Co. v. *Gibson County*, 154 Fed. 871.	20
Bailey v. *Central Vermont Railroad Co.*, 319 U. S. 350, 63 Sup. Ct. 1062	21
Berry v. *United States*, 312 U. S. 450, 61 Sup. Ct. 637	21
Blair v. *Baltimore and Ohio R. Co.*, No. 265, October Term, 1944, decided January 19, 1945	21
Eveland v. *Detroit Machine Tool Co.*, 18 Fed. (2d) 968	21
Garretsie v. *Van Ness*, 2 N. J. Law 20, 2 Am. Dec. 333.	19
Jacob v. *City of New York*, 315 U. S. 752, 62 Sup. Ct. 854	21
Perry, Appeal of, 22 Pa. 43, 60 Am. Dec. 63	19
Ross & O'Brien Iron Works, In re, 58 Fed. (2d) 961	21
Starfred Properties v. *Ettinger*, 131 Fed. (2d) 575	21

Page

U. S. for the use of Portland Cement Co. v. *McCord*, 233 U. S. 157, 34 Sup. Ct. 550 20,21
Utrecht Coal Co., In re, 63 Fed. (2d) 745 21

STATUTES CITED

Constitution of the United States, Seventh Amendment 13
Judicial Code, Section 240a, as amended 2
Miller Act (40 U. S. C. 270a and 270b) 2,12
United States Codex Annotated, Title 11:
Section 21 2,13,15
Section 42 2
Section 95 2,12,14,15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 395

F. T. NEWTON AND MRS. F. T. NEWTON,
Petitioners,

vs.

FRANK S. GLENN, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. T. Newton and Mrs. F. T. Newton, through their attorney, pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, directing it to send up the record in the above entitled cause, to be reviewed by this Court and such order entered therein as may appear from the record is mete and proper to be entered in said cause.

The Question Involved, Presented to This Court for Examination and Review and Correction

This is a bankruptcy proceeding. An involuntary petition was filed against the petitioners. There was a trial

before a jury and verdict for the petitioners. The court set aside the jury verdict and entered a judgment *non obstante veredicto.*

(a) An interpretation of the Act of Congress, Title 40, U. S. C. A., section 407.

(b) An interpretation and application of the Miller Act, Title 40, U. S. C. A., section 270 (a)-270 (b).

(c) An interpretation of the statute, Title 11, U. S. C. A., section 95.

(d) A construction of Title 11, U. S. C. A., section 21.

(e) An interpretation and application of the statute, Title 11, U. S. C. A., section 42.

Jurisdiction

The Judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 20, 1945 (R. 1928) and a petition for rehearing was denied on August 10, 1945 (R. 1936). The jurisdiction of this Court is predicated upon Section 240a of the Judicial Code as amended.

History of the Case

F. T. Newton and F. S. Glenn were partners in the constructing business. In 1942 they were constructing projects for the United States Government and its authorized agencies as emergency work. They bid the contracts and furnished performance bond and a payment bond under the provisions of the Miller Act, Title 40, U. S. C. A., sections 270(a) and 270(b). When awarded a contract the partnership procured the money with which to do the work and effect its completion under the Assignment and Claim Statute, title 40, U. S. C. A., section 407. The assignment in each and every instance was to the Union Planters National Bank & Trust Company of Memphis, Tennessee.

On March 1, 1943 the partnership was dissolved. F. T. Newton paid to F. S. Glenn $80,000.00 in cash for his interest in the contracts under construction. The partnership agreement gave to F. T. Newton a two-thirds interest and to F. S. Glenn a one-third interest. Seven contracts had been taken by the partnership and were being performed under the partnership name of Newton & Glenn at the time of the dissolution. The funds necessary for the performance of the contracts were obtained under the Congressional scheme as expressed in section 407, title 40, U. S. C. A. The seven contracts totaled a construction obligation on the part of the government to pay the contractors $4,842,040.94. These contracts were all assigned to the Memphis Bank, and the Bank paid on the contracts $4,175,000.00, leaving a balance due unpaid by the Bank $667,049.90. On May 26, 1944, the Bank had received from the government by virtue of the government's acceptance of the assignments $4,312,580.76 (See record, page 318).

After the dissolution of the partnership F. T. Newton continued to operate as the F. T. Newton Contracting Company. He entered into about sixteen additional contracts with the government and assigned all of the government checks to the Memphis Bank. This assignment was made to procure the funds necessary for the construction of the projects. He took a contract for a project at Brunswick, Georgia, the construction price of which was $2,869,999.00. The payment of this contract was assigned to the Memphis Bank. However the Bank kept this contract separate from the other contracts and assignments that had been made by Newton. On October 16, 1943, after having paid to Newton $480,000 on the assignment of the Brunswick contract for $2,869,999.00, the Bank decided that it would not advance further money to Newton.

The scheme by which the Bank had operated was that it would purchase the contracts under the assignment and

deposit the monies arising therefrom by installments as Newton, the contractor, had need therefor in the payment of material and labor in carrying on the work. There was a provision in Newton's contract whereby the labor was to be paid in accordance with the Statute each week, and in default of any payment the employees or laborers would report for duty but would do no work and would be paid time and half time in what is denominated as "stand-by" time. There was also a provision in the contract that the government would cancel the contract, on ten days' notice, if the laborers were not paid each week. On the Bank's refusal to deposit to Newton's credit the monies necessary to meet the pay-roll and pay for material purchased in the interim, he defaulted and the contract was cancelled.

Under the Newton & Glenn contract there were three projects that had not been completed and final settlement made thereon—Bainbridge, Fort Myer, and Pascagoula. The contract price on these three projects was $711,614.71. The Bank had advanced $571,000.00 against its purchase price of $711,614.71, as above stated. At the time of the Bank's refusal to pay the remaining monies on the Brunswick job there was $65,000.00 of government checks that had not been received on the Newton & Glenn contracts. The Bank caled on Glenn to pay this $65,000.00 (see exhibit record page 330). Although the Bank held the assignment of the government checks to the amount of $711,614.71 and had received $510,000.00 from the government in checks so assigned as the work had progressed, the Bank insisted that Glenn owed this money and that he should pay.

In three of the contracts of Newton & Glenn, Newton had taken in as sub-partners with him in his partnership interest of Newton & Glenn, members of his family, among whom were Mrs. J. B. Edmonson, a sister of Mrs. Newton, and her husband J. B. Edmonson. The contracts of the sub-partnership appear in the record as exhibits 25, 26,

and 27, record pages 275-282. The first contracts entered into were for Camp Campbell, Tennessee; Greenville Flying Field, Mississippi, and Rohwer, Arkansas. These jobs having been completed, R. G. Wooten, a C. P. A., was employed to audit and determine the distributive shares of the Edmonsons in the profits thereunder. The audit showed that each were entitled to $52,049.79 (Record page 1174 et sequa).

The Newtons owned certain real property in the City of Hattiesburg, the greater portion of which is what is termed slum or low class property. The property had been bought from insurance companies who had loaned money on it and had to foreclose their liens. The Newtons bought on the installment payment plan. $85,000 was still due and a mortgage to secure the payment was held against the property. Newton negotiated with the Edmonsons and induced them to accept as their part of the distributive share of the profits in three contract jobs in which they were subpartners this rental property for the $104,000 coming to them and also the Edmonsons to assume the payment of the $85,000 indebtedness secured by a mortgage on the property. The deeds transferring the property to the Edmonsons were executed on August 23, 1943 and were placed of record October 6, 1943. This left the $104,099.59 in the Memphis Bank to Newton's credit.

The Memphis Bank refused to deposit to Newton's credit monies due on the assignment on the Brunswick job. The Bank claimed that Glenn was personally liable for the $65,000.00 covered by the government assignment of the Bainbridge, Fort Myer and Pascagoula jobs. The pressure they brought on Glenn resulted in Glenn associating with him the Creosoting Company of Hattiesburg, Mississippi; the American Sand & Gravel Company of Hattiesburg, Mississippi, and Edward Doughty in filing an involuntary petition against F. T. Newton and Mrs. Newton, alleging

that the Newtons were indebted to them and had committed an act of bankruptcy by deeding the property to the Edmonsons in lieu of the partnership funds earned by the Edmonsons in the partnership business. The accounts of the petitioning creditors other than Glenn, which has been heretofore explained, consists of material furnished on the job on which payment and performance bonds under the Miller Act were in effect.

At the time of the filing of the petition in bankruptcy there was in the Bank's possession as the proceeds of the contracts so assigned, but due, $3,400,000, in round numbers, in excess of the amount of the money that it had paid to Newton. The Bank, however, had paid almost $7,000,000 on these contracts and only $5,500,000 had been refunded to it by the checks of the government as the work progressed. The bonding companies had not paid out any monies and had not performed any duties imposed upon them by the surety obligation. The record shows that Newton owed no money except that which arose under the contracts entered into with the government for the construction of the projects above outlined.

The case was tried beginning the first day of June, 1944, before a jury, resulting in the jury returning a general verdict for the defendants, and answering three questions, with the second question sub-divided into four, all to the effect that the Newtons were not insolvent and had not committed an act of bankruptcy. The questions so propounded appear in this record, pages 1605, 1606 and 1607. On the trial of the case the defendants attempted to assert the claim of indebtedness due to them by the Bank on the balance due on the contracts. However, the court excluded the claim so offered. (See record pages 1555 and 1556.) At the time of the filing of the petition in bankruptcy there was $1,500,000 that the Bank had advanced on the twenty contracts that were practically completed,

for which the government had not made payments. The rule of the government was ten percent retainage until final acceptance of the contract. The court construed the Assignment and Claim statute so as to make this $1,500,000 that the government was obligated to pay to the Bank on the accepted assignment an indebtedness against Newton. The trial was had eight months after the petition in bankruptcy was filed, and it was shown that the amount of money that the Bonding Company had to pay in completion of the Brunswick and other contracts was $1,300,000, and in instructing the jury the court told them that they must take into consideration the two debts, one for approximately $1,500,000 and one for approximately $1,300,000 in determining the solvency or insolvency of the defendants. (See record, page 1604.) The only pertinent audit and figures introduced at all was introduced by the defendants, which is the DuMain audit. This audit showed that Newton's net worth on August 31, 1943 was $289,000. The evidence showed that nothing had happened to change his financial condition at the time the petition in bankruptcy was filed on November 3, 1943.

The trial of the case was before a jury; five of the jurymen were expert accountants. DuMain testifying as a witness, identified his audit, and gave supporting evidence to support each and every entry thereon. The DuMain audit showed that Newton on August 31, 1943, had a net worth of $289,000.00. Newton testified and his testimony as to the progress of the work and the material that had been purchased between August 31 and the date of the breach by the Bank had made better his position, so that his net worth was more at that time than it was at the date of the audit. The act of bankruptcy charged and relied on was the conveyance of the real property to Mrs. J. B. Edmonson as her and her husband's distributive

share of the profits from the contracts in which they were sub-partners.

The petition in bankruptcy was filed on November 3, 1943. On December 6, more than a month after the filing of the petition in bankruptcy, the Newtons sold $10,236.00 worth of electrical equipment that they had accumulated in the warehouse at Hattiesburg to be used on the contracts and which on the breach of the contracts had been transferred to New Orleans to be sold as critical material being used in war construction work. The sale of this property was alleged to be an act of bankruptcy and brought in by supplemental petition. It was sold, however, for a fair value and the money paid therefor. The petitioning creditors relied for their proof of insolvency on the claim that Newton owed to the Bank of Memphis the $1,500,000 covered by the government assignment on the twenty contracts practically completed and payment for which was then ready to be made by the contracting agencies of the government, and the anticipated costs to the bonding company of the completion of the jobs without credits therefor for the unpaid balance and the retainage held by the governmental agencies making the contract with Newton. The entire contract at Brunswick, Georgia for more than $2,800,000.00 had been assigned to the Bank and the claim was asserted and submitted to the jury that the $1,300,000.00 cost to the bonding company would be owed when and if the bonding company completed the contract. The court so instructed the jury. (See Court's instruction, record page 1604.)

The jury heard the evidence and weighed the testimony and documentary evidence submitted to them, and under the guidance of the instructions given by the Court returned a general verdict for the defendants and answered the questions propounded by the Court to the effect that the Newtons had not committed an act of bankruptcy and were

not insolvent on any of the dates that the Court conceived to be material dates, which were August 23, October 6, November 3, and December 6. The Court, however, on a motion to set aside the verdict of the jury and to enter a judgment *non obstante veredicto,* sustained the motion, set aside the verdict of the jury and entered a judgment adjudicating the defendants bankrupt.

In setting aside the verdict of the jury the court held that a conveyance of the real property to Mrs. Edmonson as her and her husband's distributive share of the profits in the three contracts was done for the purpose of concealing their assets and hindering, delaying and defrauding other creditors, and, therefore, was an act of bankruptcy. This holding by the Court in direct conflict with the finding of the jury was without support of any testimony in the record. The testimony shows without contradiction, that the sub-partnership agreement was made more than sixteen months before the cancellation of Newton's contracts, and more than twelve months before the Brunswick contract was entered into, and fifteen months before the audit was made showing the amount of partnership distributive shares for which the conveyance was made.

The Court held in direct conflict with the finding of the jury, that the $1,500,000.00 that the Bank had paid to Newton on the assignment of the government contracts and for which the government checks had not been received by the Bank, was an indebtedness owed by Newton, and held that the $1,300,000.00 estimated cost to finish the contracts for which the Bank held assignments but had not paid, was an obligation on the surety company and was, therefore, a debt owed by Newton to the surety company. The opinion of the trial Court setting forth his reasons for setting aside the verdict of the jury and the judgment entered thereunder, appears at record pages 1655-1658.

Court Misinterprets Section 407, Title 40, U. S. C. A.

The proper interpretation of the above section is that the assignment by the contractors to the Bank is a complete transfer and conveyance of all rights, titles and interests due to the contractor by the government to the Bank, for which the Bank pays the contract price less its agreed discount, at the time of the assignment. We interpret paragraph (a) of the statute to mean that the contractor can assign the funds represented by the government's obligation to pay on the completion of the contract when he has the written consent of the surety company for the assignment with the approval of the government through its proper agencies. The Bank on accepting the assignment owes the contractor the full amount of the contract price less the agreed discount, and the Bank would have no further interest in the matter except to receive from the government the checks issued in installments as the work progressed and the final check upon its completion and acceptance. Paragraph (b) of the Act makes the funds so received by the contractor trust funds; directs how they must be paid out and imposes a heavy penalty for the failure thereof. To make it certain that the statute would not be misinterpreted, paragraph (c) provides that nothing in the section shall be construed as imposing on the assignee (the Bank) any obligation to see to the property application of the funds so derived.

This Act was passed on June 16, 1933 as the effective date. It became the corner stone of congressional and executive action to effect a recovery of the nation from the depression into which it had sunk. The government was furnishing money and awarding contracts for public work and thereby furnishing employment to the millions of unemployed people in the country. No contractor, at least very few, could borrow the money to construct the projects

planned and promulgated by the government. The President and the Congress had to develop some means by which this money could be made available other than to pay it direct from the United States Treasury or the R. F. C., and they provided for the sale of the contracts to the Banks. The contract with a bond meeting the requirements for approval by the government was a guarantee that the project would be constructed and the cost thereof paid. Even the form of the bonds was changed by the Miller Act so as to guarantee to the government the result of a finished project fully paid for.

The surety company had to give its written consent because it was more vitally concerned than any other person other than the contractor himself. With this written consent of the surety company the contractor assigned to the Bank the contract and the Bank paid to the contractor the price represented by the contract. The Government owed the Bank in this instance the $1,500,000.00. The Bank had received value in the government's guarantee that the money would be paid to it. The Court in holding that the defendants in involuntary bankruptcy proceeding were indebted to the Bank was a misinterpretation of this statute and error. The Court has thus decided an important question of Federal law which has not been, but should be settled by this court. This is presented here for decision by this Court.

The Proper Construction of the Miller Act, Title 40, U. S. C. A., Section 270(a)-270(b)

The Miller Act was enacted by Congress more than two years after the passage of the Assignment and Claim statute *supra*. The Miller Act was enacted to cure weaknesses that were found in the administration of the scheme for lifting the country out of the depression.

Section 270(a) changed the law with reference to the bonds and provided for two bonds. It provides for a performance bond and for a payment bond. Section 270(b) provides for the protection of laborers and materialmen who work or furnish materials for the prosecution of the work to a completion of the job. These statutes were found necessary in order to give effect to the Assignment and Claim statute that was enacted in 1933 and became the bedrock foundation stone of all that has been denominated as the New Deal Legislation that saved America and made it the strongest financial and military nation of the world. These bonds made the materialmen and laborers secure in the payment of the labor performed and the materials furnished. They were not common creditors, but, if creditors at all, were secured by the bonds executed under the provisions of the Miller Act. Persons so secured as materialmen or laborers were not common creditors who could petition to put the contractor in involuntary bankruptcy.

Who May File a Petition in Involuntary Bankruptcy

Title 11, paragraph 95 provides that three or more creditors who have claims against any person which would in the aggregate be in excess of the value of securities held by them, if any, to $500.00 or over may file a petition in involuntary bankruptcy. The petitioning creditors, as is shown by this record, were Frank S. Glenn, who was not a creditor at all, and three laborers and materialmen who were secured under the provisions of the bonds executed in conformity with the Miller Act. When the proof of the plaintiffs was in and it was apparent that the petitioning creditors were protected by the Miller Act and the Claims and Assignment statute, the defendants moved the Court for a directed verdict (See record, page 1143). The Court overruled the motion because he was of the opinion that Title 11, U. S. C. A. Section 95, and the Miller Act could not

be so construed. Petitioners assert that his action of the Court was erroneous. The Circuit Court of Appeals sustained him, and petitioners assert that this was error, and that this Court should review and correct the interpretation so made.

The Court's Construction of Title 11, U. S. C. A., Section 21 Was Erroneous

The Court construed Section 21, Title 11, U. S. C. A. to permit the filing of supplemental and amended petitions setting up as acts of bankruptcy acts that were committed subsequent to the filing of the original petition in bankruptcy. The sale of the critical electrical material on December 6, 1943 was alleged as an act of bankruptcy and incorporated in the petition filed November 3, 1943. The appointment of a receiver to collect the rents from the Edmonsons' property was alleged as an Act of Bankruptcy. This Receiver was appointed months after the filing of the involuntary petition in bankruptcy on November 3. The receiver was a temporary one.

The Court permitted the introduction of testimony of audits made on May 30, 1944 of the condition of the contracts at that time, when they had not been completed and the government payments had not been made a credit. It was admitted, as the Court stated, for the purpose of showing the over-all picture. The Court's interpretation of this statute was error, which was approved by the Circuit Court of Appeals and should be corrected.

Jury Trials

Section 42, Title 11, U. S. C. A., provides that when an involuntary petition has been filed that the defendant is entitled to a trial by jury in respect to his solvency and in respect to any act of bankruptcy.

The Seventh Amendment to the Constitution of the United States provides that jury trials shall be in accordance with

the common law and that no fact in a trial by jury shall otherwise be examined in any court of the United States other than in accordance with the rules of the common law.

The testimony in this case showed (Record, page 354) that the contract held by Newton amounted to $10,615,028.12. That all of this contract value was duly assigned to the Union Planters National Bank & Trust Company of Memphis, Tennessee. It is shown in the audit, and this was introduced by the petitioning creditors (Record, page 354) that the Bank had paid on the purchase price $6,791,789.00, leaving a balance unpaid of $3,823,239.02 that the Memphis Bank owed to the contractors. Of this amount paid by the Bank to the contractor for the contracts so assigned, the government had lacked something approximating $1,500,000 of refunding to the Bank. The government payments were running behind the expenditures, and it was because of this fact that the Assignment and Claims statute was enacted in 1933 and the Miller Act enacted in 1935 to permit the contractor to obtain the funds sometime ahead of the obligation of the government to pay.

On October 16, 1943, when Newton asked the Bank for $225,000.00 of this over $3,800,000 due by the Bank to him to be used in the payment of laborers, the Bank declined to pay it and forced Newton to default in the payment of his laborers and forced the cancellation of the government contracts. If the interpretation of the statutes by the District Judge and approved by the Circuit Court of Appeals is correct, they make it possible to completely wreck and make bankrupt a man that was worth more than $300,000.00.

We do not think that the interpretation placed upon the Assignment and Claims statute, the Miller Act and Section 21 Section 95, Title 11, U. S. C. A., was correct.

The Court tried the case on the theory that the defendants owed the bank and that an indebtedness that would

accrue to the bonding company eight months thereafter would relate back to the date of the filing of the petition and that if it raised the presumption that the defendants were insolvent that they should be adjudged bankrupt. All of these questions were submitted to the jury and the jury found for the defendants. On a motion to set the verdict aside and the judgment entered thereon, the Court sustained it on his theory of the law, and especially his interpretation of the Assignment and Claims statute, the Miller Act and Section 21 and 95, Title 11 U. S. C. A. The Court in his opinion referred to, sets out the fact in effect that Newton had proven himself solvent and had exonerated himself from acts of bankruptcy and that the jury so found, but that the weight of the testimony was the other way and that he would set aside the verdict of the jury and enter judgment of adjudication.

We submit to the Court that the action of the trial judge was a misinterpretation of the statutes involved. That the proper interpretation of the statutes applicable to the facts in this case, as shown by the record, supported the verdict of the jury, and that the Court was in error in setting aside the jury verdict and entering judgment non obstante veredicto. That the Circuit Court of Appeals erred in approving and affirming the acts of the District Judge and was in error.

Prayer for Writ

WHEREFORE, Petitioners respectfully submit that this petition should be sustained and prays that a writ of certiorari may issue as is provided by law.

Respectfully submitted,

F. T. NEWTON,
MRS. F. T. NEWTON,

By T. J. WILLS,
Counsel for Petitioners.